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No. 85-472

In the Supreme Court of the United States

OCTOBER TERM, 1985

DAVID BULLOCH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioners failed to produce evidence substantiating their contention that the government committed fraud upon the court in suits litigated in 1956 under the Federal Tort Claims Act.

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OPINIONS BELOW

The opinion of the court of appeals on rehearing en banc (Pet. App. 1a-25a) is reported at 763 F.2d 1115. The opinion of the panel of the court of appeals (Pet. App. 27a-39a) is reported at 721 F.2d 713. The opinion of the district court (Pet. App. 42a-91a) is reported at 95 F.R.D. 123. The opinion of the district court in the underlying Federal Tort Claims Act proceeding (Pet. App. 92a-98a) is reported at 145 F. Supp. 824.

JURISDICTION

The judgment of the en banc court of appeals was entered on May 22, 1985. On August 12, 1985, Justice White extended the time within which to file a petition for a writ of certiorari to and including September 19, 1985, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1955, petitioners filed suits against the government under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, in the United States District Court for the District of Utah, alleging that their sheep had been killed by ionizing radiation from one or more of the open-air atomic weapons tests conducted in Nevada two years earlier. One of those suits, designated as *Bulloch I*, was chosen as the lead case and proceeded to trial. On October 26, 1956, judgment was entered in favor of the government in *Bulloch I*. No appeal was taken from that judgment, and petitioners consented to dismissal of their remaining suits.

The decision in favor of the government in *Bulloch I* was based on the "great weight of the evidence indicat[ing]" that the deaths of petitioners' sheep had not been caused by radiation (Pet. App. 97a). At "first blush," the "coincidence of the period of the tests and the time of abnormal losses," as well as the fact that the sheep had developed lesions resembling radiation burns, convinced "some of the experts * * * that there was a possibility of some relationship" (*id.* at 96a). However, "[a]n extensive study" demonstrated that the lesions observed on the sheep "were neither caused nor substantially contributed to

by radiation" (*id.* at 93a). In addition, "the positive testimony from those best in a position to know" was that "the maximum amount of radioactive fallout in any area in which the sheep could have been * * * would have caused no damage" (*id.* at 97a). Of the three veterinarians "who originally suggested radiation damage, two, upon further consideration, questioned their original diagnosis" (*id.* at 96a); moreover, "[n]one of them claimed to be particularly qualified in the field of radiation" (*ibid.*). "On the other hand, some of the best informed experts in the country expressed considered and convincing judgment that radiation damage could not possibly have been a cause or contributing cause" of the deaths of petitioners' sheep (*ibid.*).[1]

2. Petitioners filed the instant case, *Bulloch II*, in 1981 as an independent action in equity to set aside the judgment in *Bulloch I* for alleged fraud upon the court.[2] Petitioners asserted that in *Bulloch I* the government, with the knowledge or participation of its attorneys, "deliberately covered up and concealed the truth concerning the extent and effects

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[1] The government contended that the deaths of petitioners' sheep were "the natural result of unprecedented cold weather * * *, inadequate feeding, unfavorable winter range conditions, and infectious diseases" (Pet. App. 93a).

[2] Simultaneously, petitioners filed motions in the original dockets of *Bulloch I* and the related suits to set aside the judgments under Fed. R. Civ. P. 60(b). See Pet. App. 43a-44a. "[A]t the outset," the district court avoided "[d]uplication of effort [and] procedural problems" by "consolidation of all of the actions" (*id.* at 44a). Ultimately, however, the district court chose petitioners' independent action as the appropriate vehicle for resolving their claims. See *id.* at 2a; Gov't C.A. App. 69.

of radiation upon [petitioners'] sheep" (Pet. App. 52a) by suppressing experimental evidence, pressuring potential witnesses, withholding and falsifying documents and data, and giving misleading answers to interrogatories.

Bulloch II was heard by the same district judge who had decided *Bulloch I*. Following trial, the district court held that the government had committed "a species of fraud upon the court" in *Bulloch I* (Pet. App. 86a). The district court's conclusion was based on four categories of events: first, that government reports indicating that petitioners' sheep had been exposed only to small amounts of radiation were misleading (*id.* at 58a-60a); second, that data derived from government-sponsored experiments that involved feeding radioactive iodine to sheep had been suppressed (*id.* at 60a-65a); third, that two veterinarians who had examined petitioners' sheep had been pressured not to give testimony favorable to petitioners (*id.* at 65a-75a); and fourth, that the government's answers to two interrogatories in *Bulloch I* had deceived petitioners into believing that all of the experts who had initially suspected that radiation was a possible cause of the deaths of the sheep eventually changed their minds (*id.* at 75a-78a). In addition, the court indicated that the government's attorneys in *Bulloch I* had "knowledge [of] the[se] distorting pressures and suppressions" but failed to "say or do anything to dispel" them (*id.* at 83a).[3]

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[3] The district court specifically concluded (Pet. App. 85a) that it could

> find no broad ulterior conspiracy, no centralized planning in high places, no corruption in the ordinary sense of the term, no overt violation of law * * *, no motive for per-

The district court stated that it would be "inappropriate" to express an opinion whether retrial of *Bulloch I* would result in a judgment favorable to petitioners (Pet. App. 81a; see also *id.* at 64a).[4] However, it found that "at the time of the original trial[,] it could not have been fairly represented to the Court that injury to at least some substantial number of plaintiffs' sheep could not have been caused by radiation" (*id.* at 81a; see also *id.* at 57a-58a).[5] Concluding that "determinative evidence which should [have] been placed before the Court at the original trial was not made available to it" (*id.* at 81a), the court ordered that the judgment in *Bulloch I* be set aside and petitioners' FTCA suits be retried. Finally, although not "lightly dismiss[ing]" (*id.* at 89a) the government's contention that petitioners' claims in this case were barred by laches, the court held that the requested relief was not foreclosed (*id.* at 84a-85a, 89a-90a).

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sonal gain, nor any other ultimate purpose than to advance the perceived interests of the United States in the unimpeded testing of nuclear weapons and to prevent this program from being needlessly interfered with or embarrassed by judicial action.

[4] Contrary to petitioners' characterization, the district court did not find that the alleged government conduct "had a material effect on the outcome of the first trial" (Pet. 6) or that "the outcome of the case might have been different" (Pet. 8). The district court explicitly declined to consider the potential effect of petitioners' claims on the underlying tort actions.

[5] The district court noted that two "[r]ecent reassessments" of the scientific data "tend[] to support" the position taken by the government in *Bulloch I*, but that one study has concluded that a causal connection existed between radioactive fallout and the deaths of petitioners' sheep (Pet. App. 79a-80a).

3. a. The court of appeals reversed in a unanimous panel opinion (Pet. App. 27a-39a) that was subsequently adopted verbatim by the en banc court (*id.* at 1a-13a). Reviewing each of the district court's findings "in relation to the record in the proceedings appealed from and to what original record and briefs are extant" from *Bulloch I* (*id.* at 8a),[6] the court of appeals held that "none of the[] several findings or conclusions" upon which the district court based its decision "are supported by the record" (*ibid.*).

As the court of appeals explained (Pet. App. 5a), "the most significant aspect of the records in Bulloch I and II is that all the information, data and witnesses were available to plaintiffs at Bulloch I." Thus, "the record shows that at Bulloch I the Government provided all data plaintiffs asked for," gave them its "file data on the investigation of the sheep deaths," and "offer[ed] to make available individuals who had participated in the study and any others" who might have relevant information (*id.* at 5a). In particular, the *Bulloch I* record demonstrates that petitioners "had available and used the same basic data used by the Government to make its estimates" of the amount of radiation to which the sheep had been exposed, and "shows that all the information

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[6] All of the extant *Bulloch I* record was made a part of the record in this case; although only a limited portion of that once "voluminous" (Pet. App. 93a) original record was still in existence at the time *Bulloch II* was filed, "[f]rom the depositions, briefs and memoranda and with the trial court's [oral and written] summary," the court of appeals concluded that "the trial as to the specific points relied on by the trial court in Bulloch II can be reconstructed with some confidence" (*id.* at 2a).

the Government had as to dosages was available" to petitioners (*id.* at 3a). Similarly, with regard to the experimental studies that petitioners allege the government concealed, "[a]ll the * * * data w[ere] published and w[ere] available to the public in 1953" and indeed were "cited * * * with clear references-citations to the details" by the very report in which petitioners claim that the experimental findings were misrepresented (*id.* at 7a). Furthermore, the district court in *Bulloch II* "did not follow the testimony of the experts" (*ibid.*), who testified that there was "no significant similarity" between petitioners' sheep and the experimental animals that had been fed radioactive material (*id.* at 6a). And since petitioners "were familiar with all the background data" and "chose not to seek additional answers or clarifications," there is "nothing to demonstrate" that the government's answers to interrogatories in *Bulloch I* were misleading (*id.* at 7a).

In addition, the court of appeals noted that all of the people "who were supposed to have participated in the suppression of evidence" that allegedly occurred in *Bulloch I*, and who still were alive to testify in *Bulloch II*, "testified specifically that there had been no suppression whatever of evidence at Bulloch I * * * [and] that there had been no attempt to pressure them as to their opinions or as to their testimony" (Pet. App. 4a). Moreover, petitioners were fully aware of the positions of the various experts in *Bulloch I* who had investigated the deaths of the sheep, and "nothing whatever * * * could have misled" petitioners as to those views (*id.* at 5a). The record in *Bulloch I* reveals that petitioners "had the data the Government had" regarding the conclusions

of the experts (*ibid.*), and the veterinarians who petitioners allege were pressured to conceal their true opinions in fact were available to and presented evidence for petitioners in *Bulloch I* (*id.* at 6a).

Based on its thorough review of the record, the court of appeals concluded that there is "no evidence whatever of fraud" (Pet. App. 9a). Petitioners "have come forward with nothing of any consequence which was not available to them at Bulloch I" (*id.* at 11a), where "[t]hey made their choice as to what to do and what to use" (*ibid.*). Petitioners, the court observed, "have set forth extravagant statements in their briefs," but the record "falls far short of proof of fraud on the court or any other kind of fraud" (*id.* at 13a). Accordingly, the court of appeals concluded that the district court "was so in error" that "its conclusion and judgment constituted an abuse of discretion" (*ibid.*).

b. Two judges dissented from the decision of the en banc court of appeals (Pet. App. 14a-25a). Noting the "historical reticence of appellate courts to overturn the grant of a new trial" (*id.* at 14a), the dissenters argued that the district court's judgment should be reversed only if it is "so clearly erroneous as to constitute a manifest abuse of discretion" (*id.* at 24a). Because they believed that the evidence "regarding whether the government intentionally tried to mislead the plaintiffs and the district court was contradictory" (*ibid.*), and because of "the trial court's better perspective * * * and the constraints inherent in the abuse-of-discretion appellate standard" (*id.* at 25a), the dissenters would have affirmed the judgment of the district court.

ARGUMENT

The decision of the court of appeals is correct and turns entirely on the factual record in this case. Accordingly, further review is not warranted.

1. At bottom, this is simply a case where petitioners' "extravagant" allegations "have not been borne out by the record" (Pet. App. 13a). As the court of appeals' opinion makes clear, the decision below is wholly fact-bound in nature. The court of appeals held, based on its considered review of the record, that "nothing whatever * * * could have misled [petitioners in *Bulloch I*]" (Pet. App. 5a), that "none" of the district court's essential findings and conclusions "are supported by the record" (*id.* at 8a), and that "there was no evidence whatever of fraud developed in the court hearings" (*id.* at 9a). Thus, the court of appeals' decision is squarely grounded in the conclusion that the evidence in the record "falls far-short of proof of fraud on the court or any other kind of fraud" (*id.* at 13a) and that the district court's ruling "was so in error" that it "constituted an abuse of discretion" (*ibid.*).

2. Petitioners argue (Pet. 13-14) that the court of appeals misapplied the "clearly erroneous" standard of review under Fed. R. Civ. P. 52(a). As petitioners acknowledge (Pet. 13), however, the issue they raise of "the proper application of Rule 52" does not warrant this Court's review.

In any event, the decision of the court of appeals is correct. The court was surely aware of the well-settled principles governing appellate review, and the standard urged by petitioners (Pet. 14) was cited both in their brief before the en banc court (Appellees' Supplemental Brief to the Court In Banc 38) and in the dissenting opinion below (Pet. App.

15a-16a, 24a). Moreover, the government candidly conceded that it had "the burden of demonstrating that the *Bulloch II* district court's findings are clearly erroneous" (Appellant's Response to the Appellees' Supplemental Brief 20). The court of appeals' opinion indicates that it found that this burden was met (see, *e.g.*, Pet. App. 5a, 9a, 13a) and that the district court's determinations were fundamentally "in error" (*id.* at 13a).

Contrary to petitioners' allegation that evidence was suppressed or withheld from them in *Bulloch I*, "the most significant aspect of the records in Bulloch I and II is that all the information, data and witnesses were available to [petitioners] at Bulloch I" (Pet. App. 5a). In fact, even before petitioners filed their Federal Tort Claims Act suits, they were given the government's files relating to its investigation of the deaths of their sheep (see Gov't C.A. App. 460). Furthermore, during the course of the FTCA litigation, petitioners did not have to file any motions to compel discovery because the government voluntarily provided access to any information, materials, or personnel that they sought (see, *e.g.*, Gov't C.A. App. 442-443, 448-457). As the court of appeals noted (Pet. App. 6a), petitioners' own "Bulloch I trial memorandum,[7] and the depositions [8] show that they had the documents and the information."

Petitioners nonetheless assert (Pet. 14) that it is "beside the point" that all of the evidence was available to them because the "government's misconduct undercut [their] ability" to develop and make use of

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[7] See Gov't C.A. App. 467-489.

[8] See, *e.g.*, Gov't C.A. App. 518-558 (deposition of Dr. Holmes).

the evidence. The record of what actually happened in *Bulloch I* is irreconcilable with petitioners' assertion. For example, petitioners argue (Pet. 5-6) that the government exerted improper pressure to "neutraliz[e]" Dr. Robert Veenstra, an Army veterinarian who participated in the government's investigation of the deaths of petitioners' sheep. However, the record plainly shows that, far from being "neutralized," Dr. Veenstra testified in *Bulloch I* that he "definitely * * * [and] positively" believed that radiation had caused the deaths of petitioners' sheep. See Gov't C.A. App. 576; see also Pet. App. 68a-69a, 70a. Furthermore, Dr. Veenstra testified categorically in the instant proceeding that he had not been pressured in *Bulloch I* to alter his opinions or to refrain from expressing them. See Gov't C.A. App. 207-213, 233; see also Pet. App. 4a. Petitioners also argue (Pet. 6 n.4) that Dr. Robert Thompsett, another veterinarian who had participated in the government's investigation, had been subject to "undue pressure * * * to change his opinion" and had "falsely renounced his views." However, Dr. Thompsett, who died before the instant proceeding was commenced, testified unequivocally and without challenge in his deposition in *Bulloch I* that he changed his opinion because "[s]ubsequent findings have proof, in my mind, that there was not enough radioactivity * * * to have caused the damages" (Gov't C.A. App. 512). And, as petitioners' trial counsel explained to the district court in *Bulloch I*, he had met with Dr. Thompsett prior to the deposition and "[a]fter talking with him—this was a risk [not to question Dr. Thompsett] I took on my own—I concluded that he had changed his mind completely, and was hostile" (Gov't C.A. App. 596).

Nor is there merit to petitioners' argument (Pet. 6-7) that the government's *Bulloch I* interrogatory answers were misleading because they did not identify "at least two investigators" who believed that radiation may have caused the deaths of petitioners' sheep. The undisputed record establishes that petitioners were given copies of the reports of *all* of the investigators (see Gov't C.A. App. 467-489), and that petitioners in fact offered testimony in *Bulloch I* from *all* of the investigators who at any time suspected that radiation had caused the deaths of petitioners' sheep (see Gov't C.A. App. 570, 575-577).[9]

Finally, petitioners' argument (Pet. 7 n.5) that the government "deliberately concealed" experimental studies whose "findings supported petitioners' claim" is unfounded. As the court of appeals correctly pointed out (Pet. App. 6a-7a), all of the experimental data had been published (see, *e.g.*, Gov't C.A. App. 164-175) and were "clear[ly]" cited in the report (*id.* at 300-344) that petitioners argue misrep-

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[9] The district court concluded that the government's interrogatory answers were "evasive" (Pet. App. 76a). However, the government's answers were explicitly limited to the views of experts at the time the answers were propounded (*ibid.*), and petitioners were aware that at least three of those people had previously held a different opinion (see *id.* at 77a). Any objection that petitioners had to the government's answers should have been raised by appropriate motion at that point. The doctrine of fraud upon the court cannot be used to excuse the failure of a party to take reasonable steps to protect its interests in trial litigation. See *USM Corp.* v. *SPS Technologies, Inc.*, 694 F.2d 505, 509 (7th Cir. 1982), cert. denied, 462 U.S. 1107 (1983). In any event, counsel for petitioners acknowledged in *Bulloch II* that the possibility of unresponsiveness in the government's answers "was not that serious to me" (Gov't C.A. App. 147).

resented the data. Thus, petitioners' complaint regarding experimental data stems not from any withholding of information, but rather from their disagreement with the experts' conclusion that the experimental studies demonstrated that "the Utah sheep and lambs had not died from radioactive exposure." Pet. App. 7a; see Gov't C.A. App. 86-87, 120-122, 301, 342-343.

3. Petitioners argue (Pet. 9-13) that the court of appeals' decision is premised on an erroneous legal definition of fraud upon the court. As discussed above, however, the court's holding rests on the fact-bound conclusions that "there was no evidence whatever of fraud" (Pet. App. 9a) and that "nothing was demonstrated which would constitute fraud on the court" or "any other kind of fraud" (*id.* at 13a). Accordingly, "nice distinctions" about what constitutes fraud upon the court were immaterial to the disposition of this case, since "proof of the ultimate fact, to wit, that the decree was obtained by fraud, fail[ed]." *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 421 (1923).

As the district court noted, "[f]raud upon the court is a nebulous concept." Pet. App. 86a (citing *Wilkin* v. *Sunbeam Corp.*, 466 F.2d 714 (10th Cir. 1972), cert. denied, 409 U.S. 1126 (1973)). Relying on this Court's decisions in such cases as *Universal Oil Products Co.* v. *Root Refining Co.*, 328 U.S. 575 (1946), and *Hazel-Atlas Glass Co.* v. *Hartford Empire Co.*, 322 U.S. 238 (1944), the court of appeals stated (Pet. App. 12a) that "[f]raud on the court * * * is fraud which is directed to the judicial machinery itself and is not fraud between the parties or fraudulent documents, false statements or perjury. * * * It is * * * fraud * * * where the impartial

functions of the court have been directly corrupted." This brief, general statement does not purport to be a precise legal definition, which would have been unnecessary to the outcome here in light of the court's determination that there was no evidence of fraud of any kind (Pet. App. 13a). Instead, it simply reflects the well-settled principle that fraud upon the court is to be distinguished from "mere 'fraud.'" 11 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2870, at 253 (1973); see also *id.* at 255 (fraud upon the court consists of " 'the most egregious conduct involving a corruption of the judicial process itself' " (citation omitted)).

In sum, the court of appeals' decision turns on petitioners' failure to substantiate their factual allegations rather than on any particular definition of fraud upon the court, and it neither embraced nor relied on any rule of law that warrants this Court's review.[10]

4. Finally, there is no merit to the argument (Pet. 11-12) that the court of appeals erroneously based its decision on petitioners' lack of due diligence in not pursuing their claim between 1956 and 1981. The court did note that petitioners "have produced nothing to explain why they waited for 25 years to file this action" (Pet. App. 11a), but it then empha-

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[10] Contrary to petitioners' suggestion (Pet. 10), the court of appeals did not hold that an attorney's "efforts to deceive the courts" do not amount to fraud upon the court. Rather, what the court held was that "the assertions of fraud against the Government, the witnesses, the Government employees, the experts *and the attorneys* for the Government were all fully tried and considered," that "there was no evidence whatever of fraud," and that petitioners "were unable to make a case *against anyone concerned*" (Pet. App. 9a (emphasis added)).

sized that "*of more importance* they have come forward with nothing of any consequence which was not available to them at Bulloch I" (*ibid.* (emphasis added)). Thus, at most, the court's observation on petitioners' delay was subsidiary to its central conclusion, previously demonstrated in the opinion, that no proof existed of any fraud by the government.

Moreover, the court of appeals did not suggest that delay—either in this particular case or in general—constituted a bar to relief for fraud upon the court.[11] At the same time, however, to allow judgments to be set aside upon grounds of fraud, and long-closed cases to be reopened and retried, is an exception to the strong societal interest in finality of litigation. See, *e.g.*, *Hazel-Atlas Glass Co.*, 322 U.S. at 244. As the court of appeals correctly recognized (Pet. App. 12a), "unexplained delays bear on the concept of the finality of judgments and the proof [required of the challenging party]." Petitioners suggest no reason why it would be inappropriate for the "rule of equity" (*Hazel-Atlas Glass Co.*, 322 U.S. at 244) allowing judgments to be invalidated for fraud to take account of any unexcused and unreasonable dilatoriness in seeking judicial redress.

Here, even before judgment was entered in *Bulloch I* in 1956, petitioners "were asserting that there had been some sort of a 'cover-up' " (Pet. App. 11a). Nevertheless, they did not pursue the instant action for a quarter of a century. And even now they have failed to identify any evidence that was not available to them at the time. In *Bulloch I*, petitioners "made their choice as to what to do and what to use" (*id.*

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[11] Indeed, the court of appeals expressly ruled that the doctrine of laches is inapplicable to proceedings involving fraud upon the court (Pet. App. 12a).

at 11a). There is no basis to give petitioners "another chance" to try their tort claims simply because their original "trial strategy" proved to be unsuccessful (*id.* at 5a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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